



Lori B. Leskin
+1 212 836 8541 office
lori.leskin@kayescholer.com

250 West 55th Street
New York, NY 10019-9710
+1 212 836 8000 main
+1 212 836 6441 fax

August 5, 2015

The Honorable J. Paul Oetken
United States District Court
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2101
New York, NY 10007-1312

Re: *In re Avon Anti-Aging Skincare Creams & Prods.*
Mktg. & Sales Practices Litig., No. 13-cv-150-JPO

Dear Judge Oetken:

We write in response to plaintiffs' Notice of Supplemental Authority regarding *Mullins v. Direct Digital, LLC*, No. 15-1776 (7th Cir. July 28, 2015). In *Mullins*, the Seventh Circuit decided to "stick" with its "weak version of ascertainability" and rejected the standard adopted by the Third and Eleventh Circuits. Slip op. at 3, 6. *Mullins* does not change the Second Circuit's standard for ascertainability – that class members must be "readily identifiable" – which Avon relied upon in its briefing. See Mem. in Opp. to Class Certif. (ECF No. 155) ("Class Opp.") at 32–35.

While identification of class members may not bear on ascertainability in the Seventh Circuit, even *Mullins* recognizes that problems identifying class members can impact other Rule 23 requirements, including manageability. Slip op. at 33–34; see also *Weiner v. Snapple Bev. Corp.*, 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010). Plaintiffs' plan for identifying class members in this case creates individualized inquiries. See, e.g., Class Opp. at 22–24 (plan of plaintiffs' expert); 35–36 (predominance); *id.* at 44–45 (manageability); see also Mem. in Opp. to Mot. to Strike (ECF No. 180) at 24–25 (resolving whether plaintiff Quintana actually purchased a class product highlights individualized nature of inquiry).

As for the *Mullins* court's discussion of commonality, also referenced in the Notice, it cannot be applied to this case. The court's commonality finding was based on the *Mullins* plaintiffs' theory of liability, that defendant falsely advertised that it had "scientific support" for its efficacy claims, *not* that the product was "ineffective" for all class members. By contrast, plaintiffs here are arguing that the ANEW Products "do not, and cannot perform as promised – for any consumer." Pls. Mem. in Support of Class Certif. (ECF No. 129-1 at 1).

Respectfully submitted,

/s/ Lori B. Leskin

cc: All Counsel (via ECF)

Chicago	Los Angeles	Silicon Valley
Frankfurt	New York	Washington, DC
London	Shanghai	West Palm Beach

62965246